

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of January, two thousand eighteen.

PRESENT:

PIERRE N. LEVAL,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

TENGCHANG YE,
Petitioner,

v.

JEFFERSON B. SESSIONS III, UNITED
STATES ATTORNEY GENERAL,
Respondent.

16-1594
NAC

FOR PETITIONER:

Gary J. Yerman, Yerman & Jia, LLC,
New York, NY.

FOR RESPONDENT:

Chad A. Readler, Acting Assistant
Attorney General; Douglas E.
Ginsburg, Assistant Director;
Timothy Bo Stanton, Trial
Attorney, Office of Immigration
Litigation, United States
Department of Justice,
Washington, DC.

1 UPON DUE CONSIDERATION of this petition for review of a
2 Board of Immigration Appeals ("BIA") decision, it is hereby
3 ORDERED, ADJUDGED, AND DECREED that the petition for review is
4 GRANTED.

5 Petitioner Tengchang Ye, a native and citizen of the
6 People's Republic of China, seeks review of an April 21, 2016
7 decision of the BIA affirming a September 29, 2014 decision of
8 an Immigration Judge ("IJ") denying Ye's application for
9 asylum, withholding of removal, and relief under the Convention
10 Against Torture ("CAT"). *In re Tengchang Ye*, No. A205 301 355
11 (B.I.A. Apr. 21, 2016), *aff'g* No. A205 301 355 (Immig. Ct. N.Y.
12 City Sept. 29, 2014). We assume the parties' familiarity with
13 the underlying facts and procedural history in this case.

14 Under the circumstances of this case, we review the IJ's
15 decision as modified by the BIA and consider only the adverse
16 credibility determination, which the BIA found dispositive.
17 *See Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 522
18 (2d Cir. 2005). The applicable standards of review are well
19 established. *See* 8 U.S.C. § 1252(b)(4)(B); *Xiu Xia Lin v.*
20 *Mukasey*, 534 F.3d 162, 165-66 (2d Cir. 2008).

21 The governing REAL ID Act credibility standard provides
22 that the agency must "[c]onsider[] the totality of the
23 circumstances," and may base a credibility finding on an

1 applicant's "demeanor, candor, or responsiveness," the
2 plausibility of his account, and inconsistencies or omissions
3 in his or his witness's statements, "without regard to whether"
4 they go "to the heart of the applicant's claim." 8 U.S.C.
5 § 1158(b)(1)(B)(iii); *Xiu Xia Lin*, 534 F.3d at 163-64, 166-67.
6 For the reasons that follow, we are unable to conclude that
7 substantial evidence supports the agency's determination that
8 Ye was not credible.

9 Initially, the agency's adverse credibility determination
10 is entirely based on discrepancies arising from Ye's credible
11 fear interview; the agency did not assess, however, whether the
12 interview record displayed the requisite "hallmarks of
13 reliability." *Ming Zhang v. Holder*, 585 F.3d 715, 725 (2d Cir.
14 2009). A credible fear interview warrants "close examination"
15 because it may "be perceived as coercive" or fail to "elicit
16 all of the details supporting an asylum claim." *Id.* at 724-25.
17 That is because "an alien appearing at a credible fear interview
18 has ordinarily been detained since his or her arrival in the
19 United States and is therefore likely to be more unprepared,
20 more vulnerable, and more wary of government officials than an
21 asylum applicant who appears for an interview before
22 immigration authorities well after arrival." *Id.* at 724.
23 Although a credible fear interview can be considered in

1 assessing credibility if "the record of a credible fear
2 interview displays the hallmarks of reliability," *id.* at 725,
3 the agency neither acknowledged this requirement nor assessed
4 the reliability of Ye's credible fear interview record.

5 Moreover, the agency's adverse credibility determination
6 is based on only one inconsistency involving the substance of
7 Ye's claim: that between his statements at his credible fear
8 interview and his later testimony about whether he was burned,
9 or merely threatened, with a lit cigarette. Ye explained in his
10 application that he misspoke during his credible fear
11 interview, and he testified that the interviewer may have
12 misunderstood him. In his decision, the IJ stated erroneously
13 that, following instructions by the snakeheads, Ye admitted
14 that he lied under oath about being burned with a cigarette.
15 Ye did admit that he lied during his credible fear interview
16 about the dates of his travel to the United States, and averred
17 that he did so because his human trafficker threatened to harm
18 his family if he did not conceal his smuggling information. But
19 Ye did not advance this explanation for the discrepancy in his
20 testimony about being threatened with a lit cigarette. The IJ
21 thus misstated the record when rejecting Ye's explanation and
22 erroneously failed to consider Ye's actual explanation. *Id.*
23 *See Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 403 (2d

1 Cir. 2005) ("Absent a reasoned evaluation of [the applicant's]
2 explanations, the IJ's conclusion that his story is implausible
3 was based on flawed reasoning and, therefore, cannot constitute
4 substantial evidence supporting her conclusion.").

5 The remaining bases for the credibility determination
6 relate only to the details of Ye's travel to the United States,
7 i.e., whether he used his own passport, and the dates on which
8 he departed China and arrived in the United States. Before the
9 REAL ID Act took effect, we held that date discrepancies "need
10 not be fatal to credibility, especially if the errors are
11 relatively minor and isolated, and do not concern material
12 facts." *Diallo v. INS*, 232 F.3d 279, 288 (2d Cir. 2000)
13 (internal citations omitted). Although the REAL ID Act allows
14 an IJ to "rely on any inconsistency . . . in making an adverse
15 credibility determination," the "totality of the
16 circumstances" must still support the determination that the
17 applicant is not credible. *Xiu Xia Lin*, 534 F.3d at 167. On
18 appellate review, "[w]e must assess whether the IJ has provided
19 specific, cogent reasons for the adverse credibility finding
20 and whether those reasons bear a legitimate nexus to the
21 finding." *Id.* at 166 (internal quotation marks omitted).

22 The agency made no attempt to explain why the four-day
23 departure date discrepancy, three-day arrival date

1 discrepancy, and inconsistency about whether Ye travelled on
2 his own passport undermined the entirety of Ye's claim. The
3 agency's failure to supply any reasoning in this regard
4 precludes meaningful review of its analysis. See *Poradisova*
5 *v. Gonzales*, 420 F.3d 70, 77 (2d Cir. 2005) ("Despite our
6 generally deferential review of IJ and BIA opinions, we require
7 a certain minimum level of analysis from the IJ and BIA opinions
8 denying asylum, and indeed must require such if judicial review
9 is to be meaningful.").

10 We have additional concerns with the agency's reliance on
11 possible inconsistencies in Ye's travel-related statements.
12 For example, the IJ rejected Ye's explanation for the departure
13 date discrepancy solely because Ye was under oath during his
14 credible fear interview. This finding is in tension with our
15 case law calling for "close examination" of credible fear
16 interview statements because the interview may "be perceived
17 as coercive" and the alien may be "wary of government
18 officials." *Ming Zhang*, 585 F.3d at 724. For similar reasons,
19 the IJ's rejection of Ye's explanation for the passport
20 discrepancy is also troubling. Ye asserted that he concealed
21 information during his credible fear interview at the human
22 trafficker's direction, and under threat from the trafficker.
23 The IJ rejected this explanation on the grounds that Ye was

1 provided with an interpreter, waived the presence of counsel,
2 and was under oath when he made the relevant statements. The
3 IJ's references to an interpreter being present and to Ye
4 waiving the presence of counsel do not clearly relate to Ye's
5 explanation that he lied to prevent his smuggler from acting
6 against his family in China, and do not reflect reasoned
7 consideration of Ye's explanation. See *Xiu Xia Lin*, 534 F.3d
8 at 166; *Cao He Lin*, 428 F.3d at 403. And, as noted above, the
9 mere fact that Ye was under oath during his credible fear
10 interview does not support the wholesale rejection of his
11 explanation. See *Ming Zhang*, 585 F.3d at 724.

12 In light of the foregoing errors in the agency's
13 credibility analysis, we are unable to conclude that
14 substantial evidence supports its adverse credibility ruling.
15 See *Xiu Xia Lin*, 534 F.3d at 165-67. All but one of the bases
16 for the credibility determination concern Ye's travel to the
17 United States, and the agency did not address the reliability
18 of the credible fear interview or otherwise explain how, viewing
19 the totality of the circumstances, these discrepancies
20 regarding his travel and the single inconsistency regarding
21 whether Ye was burned or merely threatened with burning render
22 the entirety of Ye's claim not credible. See *Poradisova*, 420
23 F.3d at 77. Ye also argues that the BIA erred by failing to

1 consider whether he independently established a well-founded
2 fear of future persecution and challenges the IJ's alternative
3 non-credibility based rejection of his future persecution
4 claim. But, because the credibility determination was the sole
5 basis for the BIA's denial of relief, only the credibility
6 determination is properly before us. *Xue Hong Yang*, 426 F.3d
7 at 522. Had the adverse credibility determination been
8 supported by substantial evidence, it would have applied to Ye's
9 description of both his past and his current practice of
10 Christianity, and would therefore have afforded a basis for
11 denying Ye's claims based on both past and future persecution.
12 See *Paul v. Gonzales*, 444 F.3d 148, 154 (2d Cir. 2006).

13 For the foregoing reasons, the petition for review is
14 GRANTED, the BIA's order is VACATED, and case is REMANDED for
15 further proceedings consistent with this order. As we have
16 completed our review, any stay of removal that the Court
17 previously granted in this petition is VACATED, and any pending
18 motion for a stay of removal in this petition is DISMISSED as
19 moot. Any pending request for oral argument in this petition
20 is DENIED in accordance with Federal Rule of Appellate
21 Procedure 34(a)(2), and Second Circuit Local Rule 34.1(b).

22 FOR THE COURT:
23 Catherine O'Hagan Wolfe, Clerk of Court